



September 26, 2016

Via E-Mail

Ms. Monet Vela  
Office of Environmental Health Hazard Assessment  
P.O. Box 4010  
Sacramento, California 95812-4010

Re: Notice of Proposed Rulemaking Amendment to Section 25603.3, Title 27, California Code of Regulations, Warnings for Exposures to Bisphenol A from Canned and Bottled Foods and Beverages

Dear Ms. Vela:

The North American Metal Packaging Alliance, Inc. (NAMPA)<sup>1</sup> provides these comments in response to the Office of Environmental Health Hazard Assessment's (OEHHA) notice of proposed rulemaking to extend the emergency regulation for warnings for exposures from bisphenol A (BPA) from canned and bottled food and beverages (Section 25603.3, Title 27 of the California Code of Regulations).<sup>2</sup> NAMPA is pleased to offer these comments.

In addition to the requirement to provide to retailers a list of products to be covered by the warning sign program, the proposed rulemaking also would require food and beverage manufacturers to provide OEHHA with a list of all food products for which a warning is being provided for the BPA that was used in the manufacture of the can lining or jar or bottle seals. As outlined below, while NAMPA supports the continuation of the warning sign program in 2017, NAMPA is opposed to the OEHHA website listing because it is not necessary, not consistent with the Proposition 65 (Prop 65) mandate, imposes unnecessary resource burdens on

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<sup>1</sup> NAMPA is a not-for-profit corporation committed to protecting health through the safety of metal packaging and metal packaged foods. NAMPA's membership includes companies and associations representing various sectors along the supply chain for the food and beverage packaging industry.

<sup>2</sup> As stated in our past comments related to the warning sign program, NAMPA remains fundamentally opposed to the listing of BPA under Prop 65. The listing is inconsistent with current risk assessments recently conducted by the U.S. Food and Drug Administration (FDA) and the European Food Safety Authority (EFSA).



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industry and the government, and will not achieve the stated goals. If OEHHA believes consumers need information, it should encourage companies that have changed or are transitioning from linings manufactured with BPA voluntarily to identify their products on a publicly available site.

### **OEHHA Should Continue the POS Warning Sign Program in 2017**

NAMPA supports the proposed regulation to continue the point of sale (POS) warning sign program that was established by emergency regulation in April 2016. In its emergency regulation proposal, OEHHA stated its plans to commence the currently proposed regular rulemaking to adopt the POS regulation for a one-year period. OEHHA further stated that this one-year period was needed to ensure an orderly transition to providing more product-specific warnings for BPA exposures, and where applicable, for manufacturers to switch to alternative coating options. Retailers and manufacturers have relied on OEHHA stated timelines in their transition plans. If OEHHA reneges on its plans for the one-year period, it will cause turmoil in the marketplace, which presumed it would have the time that OEHHA stated in its initial proposal.

The reasons originally offered by OEHHA to support the emergency regulations continue to apply today. Canned and bottled goods can have a shelf-life of up to three years, which means retail store inventories likely include food and beverages packaged before May 2015. Without the POS warnings, consumers will be faced with multiple warnings on store shelves. The standard POS warning sign is the best approach to provide consumers with the warning mandated under Prop 65. Further, without the continued safe harbor afforded under the POS warning program, which OEHHA indicated would be in place through 2017, grocers could feel vulnerable to lawsuits over labeling mistakes, and remove canned and bottled goods from their shelves. It is this issue that OEHHA wished to avoid, knowing that it would adversely impact low-income communities that may rely on canned goods because they are affordable and easily stored.

### **OEHHA Website Not Necessary to Inform Consumers**

OEHHA has stated that a secondary list is necessary to inform consumers. That is not the case. The current program includes a list of all products for which a warning is being provided. That list was generated by the only entities that can make the decision as to whether warnings are necessary -- the manufacturers and retailers of the products. Consumers wishing to know which products are covered can review the list on a publicly available website. Further, a searchable version of the product list has been generated by a non-governmental organization (NGO), which is also publicly available. There is no compelling reason for OEHHA to pursue a secondary list, given that the information that allows consumers to differentiate what is on the list and what is not is already readily available.



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### **OEHHA Website Not Consistent with Prop 65 Mandate**

Prop 65 requires businesses to provide a clear and reasonable warning before knowingly and intentionally exposing anyone to a listed chemical. As OEHHA is well aware, the use of BPA in the manufacture of a food can lining does not necessarily mean that a business is knowingly and intentionally exposing a person to BPA from the consumption of that canned food or beverage. Thus, the food product list proposed by OEHHA fails to differentiate between products and their potential BPA exposure or lack thereof. The OEHHA list will not, despite the statement to the contrary on the OEHHA website, provide increased information regarding exposures to BPA from canned and bottled foods and beverages. In fact, it will convey misinformation.

OEHHA's authority under Prop 65 is rooted in the belief that Californians should be warned of potential exposure to listed chemicals. The use of BPA as a reaction product in a can lining or bottle seal cannot lawfully be regarded as a surrogate for exposure. OEHHA cannot arbitrarily expand the scope of Prop 65 to require information on materials used in product manufacturing where such use does not result in "exposure," as this term is defined under Prop 65. The responsibility for determining potential exposure and associated warning lies with the manufacturer and the retailer. Those entities have already determined what products require warnings and have made that information available.

### **OEHHA Website Will Not Inform California Consumers**

OEHHA is mistaken that focusing on canned food or beverage products where BPA is used in the manufacture of linings or seals will help identify those products that could cause measurable BPA exposures. As OEHHA states "BPA has been found in foods packaged in materials that did not have BPA intentionally added by the manufacturer of the lining or seal," so products not listed on the OEHHA database could still result in consumer exposure to BPA. Thus, the proposed OEHHA list and website will provide no benefit to the consumer looking for information on potential BPA exposure.

### **OEHHA Website Costly for Government and Industry**

In May 2016, California Governor Jerry Brown presented a state budget with overall spending held flat. His budget team reported that "California could face as much as a \$4-billion deficit by the summer of 2020."<sup>3</sup> Given this mandate to avoid additional spending,

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<sup>3</sup> *Los Angeles Times*, "Gov. Jerry Brown sends lawmakers revised California budget with less money to spend on new programs," May 13, 2016. See <http://www.latimes.com/politics/la-pol-sac-jerry-brown-revised-state-budget-20160513-snap-story.html>.



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coupled with OEHHA's already extremely limited staff, resources, and budget, it makes no sense to develop, implement, and maintain the proposed database. As previously noted, a database of products covered by the warning sign program is already available. The secondary list that OEHHA is proposing will be essentially the same, despite OEHHA's view that this list will be significantly smaller, and it will convey misinformation in violation of manufacturers' rights. By requiring two lists, OEHHA is violating the law, increasing its workload while demanding industry stakeholders to report the same information to two entities, and further contributing to California's budget woes.

In addition to creating the database, OEHHA will need to have a robust process in place to update it. Some companies may be transitioning to non-BPA alternatives through mid-2017. We question whether OEHHA has adequate resources to ensure that these changes are made immediately when requested, as manufacturers and brand companies have every reason to expect given the commercial implications of the listing.

Finally, OEHHA has already determined that the warning sign program will terminate on December 30, 2017. As highlighted above, the database will not achieve the goal of providing the public with meaningful information on exposure. This indisputable fact, coupled with the lack of expendable OEHHA staff to implement and maintain the database that will expire in twelve months, present compelling reasons why the secondary database is illegal, unwarranted, ill-advised, and should not be pursued.

### **OEHHA Should Allow for List of Products that Do Not Use BPA in Lining or Seal**

NAMPA believes OEHHA lacks authority under Prop 65 to require companies to report on materials used in the manufacture of their products. Given OEHHA's view that consumers are interested in having access to information related to can coatings and the use of BPA, NAMPA would be willing to support a voluntary effort in which companies that have transitioned or are currently transitioning to coatings or seals without BPA intentionally added can identify themselves and their products. OEHHA could provide a link to the list on its website for those public stakeholders looking for this type of information.

This above-described list would be far more accurate and helpful to consumers, and much more convenient to persons concerned about BPA. NAMPA is well aware that OEHHA is encouraging companies to transition from BPA, despite FDA's and EFSA's assurances of safety and the 40 year track record of no food borne illnesses from the failure of a can coating. If OEHHA believes consumers wish to know what products have coatings that do not use BPA, it makes more sense to provide that information directly, rather than a list of products that do use BPA.

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Thank you for this opportunity. If you or your staff has any questions regarding this letter, please do not hesitate to contact me. I can be reached at [kroberts@metal-pack.org](mailto:kroberts@metal-pack.org).

Respectfully submitted,

A handwritten signature in black ink that reads "Kathleen M. Roberts". The signature is written in a cursive style with a large initial 'K'.

Kathleen M. Roberts  
Executive Director